Supreme Court, U.S.
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No. 03-312

IN THE

Supreme Court of the United States

MAHER TERMINALS, INC.
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and VINCENT RIGGIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, AMERICAN SHIPBUILDING ASSOCIATION and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

F. EDWIN FROELICH *
CHARLES T. CARROLL, JR.
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* *Counsel of Record*

Attorneys for Amici Curiae

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether Employment "Status" For Respondent Riggio Under The Longshore And Harbor Workers' Compensation Act Should Be Determined Based On: (1) "The Job He Was Hired For," As Held By The Ninth Circuit, Or (2) An Examination Of An Undefined Period Of His Past Work History, Unrelated To "The Job He Was Hired For," As Held By The Third Circuit?

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INTEREST OF *AMICI*[1]

The National Association of Waterfront Employers (NAWE) is a not for profit tax exempt 501(c)(6) trade

[1] Pursuant to S. Ct. Rule 37.2, letters of consent on behalf of Petitioner, Respondent, and the Federal Respondent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* state that they authored the brief in its entirety and that no party, other than the three *amici*, has made a financial contribution to the brief. Petitioner Maher Terminals, Inc. is a member of NAWE and has not made a financial contribution to this brief, other than through its annual dues assessment to NAWE.

association whose member companies are marine terminal operators/stevedoring contractors which load and unload 90% of the general cargo and containers on and off vessels in every U.S. seaport. With the exception of those members located in Puerto Rico, NAWE members are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA or Act).

The American Shipbuilding Association (ASA) is a national trade association representing the six major U.S. shipbuilders which build large commercial ocean going vessels and all of the capital ships of the U.S. Navy. ASA's six members employ over 53,000 shipyard employees in their shipyards, which is 90% of all shipyard workers engaged in new vessel construction in the U.S.

Signal Mutual Indemnity Association, Ltd. (Signal Mutual) is a group self-insurance facility authorized by the Secretary of Labor, pursuant to the LHWCA, to secure compensation benefits payable under the Act for its 200+ member employers.

All of the employers represented by NAWE, ASA, and Signal Mutual employ labor, on one or more sites generally covered by the Act, in employment categories subject to the LHWCA. Most all of them also employ other categories of workers on these same sites, such as the office clerk—Respondent Riggio—in this case, which are specifically exempted by the LHWCA from coverage under the Act. Thus, individually and collectively, *amici* have a keen interest in persuading the Court to grant the Petition for Certiorari so that a clear and uniform national rule setting forth the proper jurisdiction of the Act, as intended by the Congress, can be established.

SUMMARY OF ARGUMENT

An individual covered by a state workers' compensation statute is not eligible for coverage under the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA or Act) if the individual is "employed exclusively to perform office clerical . . . work." LHWCA at § 902(3)(A). The federal question presented for certiorari is whether or not past employment history, unrelated to the job for which an individual was hired, should be considered when making this determination.

The Ninth Circuit held that the inquiry must be limited to the job for which the individual was hired without consideration of prior employment history. The Third Circuit held that even when it is clear that the job for which the individual was hired falls squarely within the statutory exclusion, an inquiry into some undefined period of past employment is required. This conflict between the circuits can only be resolved by the Supreme Court.

In addition, in the LHWCA context, this important question of federal law has not been previously addressed by the Court. If left to stand, the Third Circuit's holding would leave both employers and employees guessing as to who is and is not covered by the LHWCA, an untenable black hole for employers subject to an insurance program required and governed by federal maritime law. Upholding this approach would require years of litigation to determine what prior work history to consider and how. Only this Court can resolve the proper jurisdictional contours of the Act, as established by Congress, and thus avoid wasting the limited financial resources of covered employers and the significant economic consequences to those maritime industries covered by the Act. The uniformity and certainty of maritime law generally required by this Court also argue for granting the Petition for Certiorari.

ARGUMENT

Employers generally subject to coverage under the LHWCA typically employ some workers who are covered by the Act, and some workers who are covered by a state workers' compensation insurance regime. As with many LHWCA cases, this is not a question of whether Respondent Riggio is entitled to compensation, for that question was long ago resolved. Instead, the issue in this case is which workers' compensation statute applies—the federal LHWCA or a state workers' compensation statute.

The consequences of this legal question are far from academic, either for Respondent Riggio or for covered maritime employers, since the LHWCA is perhaps the most expensive workers' compensation program in the country.[2] Congress has recognized the significant costs associated with the LHWCA in the past and has taken substantial steps to conserve covered employers' financial resources by restricting claims to those truly subject to the maritime jurisdiction of the U.S., and excluding claims from other classes of workers best left outside this jurisdiction.[3]

An individual is only eligible for compensation under the LHWCA if the individual meets both the "situs" and "status" requirements of the Act. Situs is not at issue in this case.

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[2] The shore-based longshore workforce is close to, if not the highest paid blue collar workforce in the country with average compensation exceeding $100,000 per year, and with some specialized crane operators making over $300,000 per year. (There are even several attorneys who have chosen to forego the practice of law to be part of this workforce.) Over and above this compensation level, covered employers purchasing LHWCA insurance face additional costs in many maritime states that exceed fifty percent (50%) of their payroll costs.

[3] In addition to the 33 U.S.C. § 902 (3)(A) exemptions enacted in 1984, including the specific office clerical exemption at issue here, the Act contains other exemptions from coverage, such as employees of federal, state, or local governments. 33 U.S.C. § 903(b).

Instead, this case turns on whether Mr. Riggio meets the status requirements of the LHWCA, i.e., whether he is a covered "employee" for purposes of the Act:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .

33 U.S.C. § 902(3). Congress in 1984 expressly excluded a number of categories of individuals who are frequently employed on a covered maritime situs (thus meeting the situs test for coverage under the Act) by expressly excluding them from the definition of employments subject to the Act (thus not meeting the Act's status test). Of relevance to this case is the first exception:

> but such term does not include—(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work . . .

33 U.S.C. § 902(3)(A). Thus, an individual performing office clerical, secretarial, security, or data processing work on a covered maritime worksite, is still expressly excluded from coverage under the LHWCA.

It is not in dispute that Respondent Riggio was performing office clerical work at the time of his injury. In other words, the work he was performing at the time of his injury was not eligible for coverage under the LHWCA. That fact would end the case right there but for one word in the statute—"exclusively." Was Mr. Riggio employed *exclusively* to perform office clerical work?[4]

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[4] On the date of his injury, Respondent Riggio was hired to work as a clerk in an office on the terminal, and not as a 'checker' clerk dealing directly with cargo containers at the terminal's truck lanes. Under the terms of the applicable collective bargaining agreement between the New

THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE THE THIRD CIRCUIT AND NINTH CIRCUIT HAVE ISSUED CONFLICTING DECISIONS ON THIS IMPORTANT QUESTION OF FEDERAL LAW.

The Third and Ninth Circuits have issued conflicting decisions on how to apply the term "exclusively" under the LHWCA. The Ninth Circuit adopted this Court's approach in *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997) to answer the question of the meaning of "exclusivity." In *McGray Construction Company v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999), the Ninth Circuit held that the test for "exclusively" must be applied to the job for which an individual is hired, regardless of his past employment history.

The Ninth Circuit stated the issue as follows:

> The main issue in this case is whether a person who has mostly done maritime work in the past, but takes a nonmaritime job, gets compensated for workplace injury under the workers' compensation system or the Longshore and Harbor Workers' Compensation Act.

McGray at 1009. The Ninth Circuit was clear that past employment has no bearing on LHWCA status. Instead, status must be determined based on the job for which the employee is hired:

> By analogy, working out of a union hall from which employers regularly hire maritime workers, and a history of maritime employment, do not make one a maritime

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York Shipping Association and the International Longshoremen's Association, Mr. Riggio could not be transferred from employment as an office clerk to employment as a checker clerk. "A clerk hired during the regular work period to perform office work shall not be transferred to other duties on the dock during that period." Part XI, para. 3 (A)(1)(b) *Clerking Agreement/Checkers Agreement between the NYSA and the ILA for the Port of Greater New York and Vicinity.* It appears to *amici* that this fact was not disputed below.

> employee, when an employer hires the individual for a non-maritime job. The statutory term "person engaged in maritime employment" means "engaged" on this job. That a person has been engaged in maritime employment in other jobs, and that he is hired out of a union hall that includes maritime workers, does not bring him within the Act, if his current employment is non-maritime.

McGray at 1014. The Ninth Circuit also noted that any other approach would lead to nonsensical results:

> The Director's position would also promote such striking unfairness to workers that the construction is unlikely to be what Congress intended. . . Congress did not in the Act create an aristocracy of labor, so that long-time maritime workers would be compensated more amply than others, even when hired for non-maritime employment, keeping their superior status while between maritime jobs.

McGray at 1016.

The Third Circuit in this case, rejected the sound reasoning of *McGray* and chose not to follow this Court's reasoning in *Harbor Tug. Director, OWCP v. Maher Terminals, Inc. (Riggio)*, 330 F.3d 162 (3rd Cir. 2003). The Third Circuit first recognized Respondent Riggio would not be eligible for coverage under the LHWCA based on the job for which he was hired:

> The law is clear that delivery clerks, performing the function that Riggio was on the day of his injury, are not covered under the Act. *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3d Cir. 1977); *see also Sette v. Maher Terminals, Inc.*, 27 BRBS 223 (1993) (denying coverage for a delivery clerk).

Riggio at 168. While this clear holding should have been the end of the case, the Third Circuit then proceeded to conduct an inquiry into Mr. Riggio's unrelated past employment experiences. In other words, the Third Circuit conducted the inquiry that the Ninth Circuit expressly held that Congress

never intended, and the inquiry that this Court declined to undertake in *Harbor Tug*.

This split in the circuits can only be resolved by this Court and we urge this Court to accept certiorari to resolve it.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN—BUT SHOULD BE—SETTLED BY THIS COURT.

The federal question presented for certiorari has not been addressed by this Court before and has important national economic implications for covered maritime employers.[5] As noted above, the legal principle was touched on by the Court in *Harbor Tug*. *Harbor Tug* involved the jurisdictional boundaries between the Jones Act, 46 U.S.C. App. § 688(a), and the LHWCA. The Jones Act and LHWCA are sister statutes that both find their authority in the admiralty and maritime jurisdiction of the federal government, (U.S. Const. Art. III, cl. 2), both have their origin in the maritime tradition of "maintenance and cure," and both have coverage that is mutually exclusive of the other. The Court noted in *Harbor Tug* that:

> In *Chandris*, the words "particular employer" give emphasis to the point that the inquiry into the nature of

[5] Most of the employer members of *amici* NAWE and the ASA are authorized by respondent Office of Workers' Compensation Programs (OWCP), pursuant to the applicable provisions of the LHWCA, to establish self insurance programs, and all members of *amicus* Signal Mutual Indemnity Association, Ltd. fall under the umbrella of this self insured mutual facility. These self-insurance programs need the nationwide uniformity and certainty, generally associated with this Court's maritime jurisprudence, of knowing exactly which of their employees are subject to LHWCA coverage, and which are excluded, in order to take reasonable care to conform their terminal employment practices to the jurisdictional contours of the LHWCA. These covered employers have been relying on the exclusions enacted by Congress when the Act was last amended in 1984 to manage healthy insurance programs.

> the employee's duties for seaman status purposes may concentrate on a narrower, not broader, period than the employee's entire course of employment with his current employer.

Harbor Tug at 556. The Court went on to hold that:

> Considering prior employments with independent employers in making the seaman status inquiry would undermine "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA) before a particular work day begins."

Harbor Tug at 558, quoting *Chandris, Inc. v. Latsis*, 515 U.S. at 363.

The Ninth Circuit holding provides the certainty that this Court held is required by both the Jones Act and the LHWCA. Looking to the job for which an employee is hired, nothing more and nothing less, provides certainty for both the employee and the employer. When an employee is hired for an expressly exempt job, the employee is not covered. When an employee is hired for a covered job, the employee is covered.

The Third Circuit approach fails to provide this certainty. To the contrary, without years of further litigation, it will be impossible to tell which employees are covered by the LHWCA and which are not. What prior work history should be considered? How many years or months back should the inquiry go? What happens if there is a gap in work for a day, a week or a month or six months before an employee returns to a non-covered position? How are multiple short gaps treated? What if an employee works in a covered position, and then works for another employer for a day or a week, before taking a non-covered position? These are just the start of the questions that must be answered under the Third

Circuit's approach before employers and employees can start to have any idea of who is—and who is not—covered by the LHWCA.

Equally as important, the Third Circuit's approach leads to the absurd results discussed by the Ninth Circuit. Two employees working side-by-side performing the exact same work, both get injured, but one is covered by the LHWCA and one is not because of past, unrelated work. Or two employees are hired to perform office work. They both did longshore work for the past six months, but one of them did the longshore work for another employer. Under the Third Circuit's holding, one would be covered by the LHWCA and the other would not.

If the Third Circuit's holding is allowed to stand, short of removing office clerical employment entirely from a covered situs, the only approach an employer could take to avoid this legal minefield would be to refuse to hire any worker who had ever worked for the employer before in a covered employment category for these highly coveted office clerical jobs. Clearly, Congress did not intend such absurd results. This Court should accept certiorari to resolve this important question of federal law and bring certainty to the application of the LHWCA.

CONCLUSION

Because there is a split in the circuits and this is an important question of federal maritime law that needs to be resolved by this Court, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

F. EDWIN FROELICH *
CHARLES T. CARROLL, JR.
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Attorneys for Amici Curiae

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